

In The

Supreme Court of the United States

78-1875

Supreme Court, U. S.
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MICHAEL J. BAKER, JR., CLERK

October Term, 1979

No. 78-

GALE GREENBERG,

Respondent,

vs.

DONALD LEE McCABE, D.O.,

Petitioner.

**BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT**

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Whether the petitioner, defendant in a civil case, who did not request that he be represented by an attorney other than the one chosen by his insurer, did not offer any authority to the trial judge for the proposition that his defense could be conducted by two separate attorneys, never requested such dual representation until the first scheduled day of trial, and made no objection to the trial court's ruling of one questioner per party, was represented by his choice of counsel.

II. Whether the petitioner, defendant in a civil case, is entitled under the Fifth Amendment or Pennsylvania law to be represented by two attorneys at trial.

COUNTERSTATEMENT OF THE CASE

In order to place this civil defendant's claim of a denial of the right to choice of counsel in proper context, a few facts need be mentioned in addition to those stated in the petition for a writ of certiorari.

With one exception, the entire involvement of Jonathan D. Dunn, Esquire, prior to the post-trial proceedings in this case was on the first scheduled day of trial, a day when no testimony was heard, and is contained in the Appendix to the Petition at pp. 7-10. That exception is his entry of appearance on April 11, 1977, over fourteen months after the complaint had been filed and after the case had appeared on the trial list and been continued, as "co-counsel" for defendant (Appendix, *infra*, at 1a).

There is no evidence in the record of Mr. Dunn ever having brought the issues raised in this Court to the attention of the trial judge, Chief Judge Joseph S. Lord, III, prior to September 6, 1977, the day the jury was empanelled. There is no evidence of the reappearance of Mr. Dunn in the courtroom after adjournment at 2:25 p.m. that first day because of a mechanical breakdown in the courthouse (2a). Nor could there have been any evidence of either.

The defendant in this psychiatric malpractice action, Donald Lee McCabe, D.O. was represented before and at trial by Edward B. Joseph, Esquire, a highly competent and experienced member of the Philadelphia trial bar, who has filed a separate petition on behalf of Dr. McCabe. Nowhere do his attorneys allege or even imply that Mr. Joseph's representation was inadequate. Instead, his attorneys for this petition claim a

right to the active participation of two attorneys during the course of trial, an issue which was not pursued until after trial, and then only upon the ground of state law until reaching this Court.

REASONS FOR DENYING THE WRIT

I.

The civil defendant was represented by his choice of counsel.

No purpose would be served by granting certiorari where there is no factual support in the record below for the legal position taken by petitioner in this Court and where there is a failure to raise and preserve the issue.

A review of what is, and is not, in petitioner's Appendix is instructive. His Appendix contains two letters, both addressed to Dr. McCabe from his insurance carrier. The first is dated March 31, 1976, and advised him that he was "... at liberty, if [he] so desire[d], to associate [his] own personal counsel, at [his] own expense, in the defense of this suit." (Petitioner's Appendix at 3). The second, dated March 11, 1977, advised him that the carrier would "... continue to afford [him] a defense throughout this case ..." (Petitioner's Appendix at 6). Neither letter was in the lower court record. Surely, if there had been any response from Dr. McCabe that he did not wish to be represented by an attorney engaged by the carrier or that he chose to be represented by any other attorney of his own choosing, that response would have been appended to the petition.

Mr. Dunn's participation in chambers the first day is also illustrative of Dr. McCabe's desires. Mr. Dunn began by stating: "As private counsel here, it is difficult to know when to step in or to do it at all," (emphasis added) (Petitioner's Appendix at 7). He followed this with the admission: "[W]here I get into the act

I don't really know here because Mr. Joseph really has carried the ball all the way through" *Id.* When Judge Lord advised that he would ". . . only permit one attorney to cross-examine for one client," Mr. Dunn did not ask to be that attorney; his response was: "Very well." *Id.* at 7, 8. Mr. Dunn next encouraged the trial judge to make a similar ruling in regard to closing argument:

"But that leaves us at the point where the address to the jury at the end, I do get a crack at it, or don't I?"

THE COURT: Well, I will have to think about that.

MR. DUNN: You would have in effect two attorneys addressing the jury on behalf of one defendant.

THE COURT: My *inclination* is that only one attorney gets a crack at the jury for one defendant." (emphasis added). *Id.* at 8.

At no point did Mr. Dunn request that he act instead of Mr. Joseph, nor did Chief Judge Lord require that Mr. Joseph be the one attorney cross-examining or addressing the jury. Finally, when Mr. Dunn suggested the question of two attorneys posing objections, the judge requested a citation to authority. Again Mr. Dunn acquiesced without objection:

"THE COURT: Well, you were aware that this problem was going to arise. Do you have any authority on this? Have you looked up any law? Have you attempted to find any law?"

MR. DUNN: I have none with me.

THE COURT: Then I will rule against you until you find something.

MR. DUNN: Then you are ruling that I have no right to participate in effect in this case.

THE COURT: That is right. If you don't think enough of your position to look up some law to give it to me, then I don't think enough of it to sustain your position.

It is a most unusual kind of a situation. I would certainly have thought that you would have given me some law on that, but since you haven't I will simply rule against you *until* you find some law to the contrary.

MR. DUNN: Very well, sir." (emphasis added). *Id.* at 8-9.

Moreover, Mr. Dunn backtracked during the afternoon session from any contention such as the one of conflict of interest which has now been raised:

"MR. DUNN: O.K. Now, with reference to the conference in the judge's chambers, I held myself as representing the individual defendant; in effect meaning the defendant excess in case — whatever the limits.

Now, I thought perhaps I might have misled the Court. Our position is here that he didn't do anything. Nothing wrong with what he did, but if he did do so it was negligible and not intentional, and that there should be coverage in effect.

THE COURT: That is not before me.

The court did *not* rule that Mr. Dunn had no right to "participate" in the trial, or that he could not sit at defense table and assist Mr. Joseph. Mr. Dunn's decision to abandon the proceedings at that point was entirely his own.

One is left with the inescapable conclusion that Dr. McCabe never selected anyone other than Mr. Joseph to act as his counsel at trial and that Mr. Dunn simply bowed in and out of his own accord. There must be an attempt to raise and preserve a claimed right; else, it is waived. There is also a waiver where an attorney absents himself from the courtroom:

"It is the right and duty of attorneys to be present in the court room at all times the Court may be in session in his cause. Any attorney who voluntarily absents himself during such times or during the deliberation of the jury, waives his right and that of his clients to be present and consents to such proceedings as may occur in the court room during such absence." Local Rule of Civil Procedure of the United States District Court for the Eastern District of Pennsylvania 32(c).

Finally, it should be noted, as petitioner acknowledged and the trial judge held, that any conflict between the defendant and his insurer is properly the subject of another proceeding, the declaratory judgment action, which was instituted after the verdict (Petition at 4). The conflict of which the defendant now complains was not created by the court or by the plaintiff. Rather, it was created solely by the defendant and/or his representatives. No ruling of the court prevented the defendant from seeking trial representation by an attorney not selected by his insurance carrier; nor did any ruling of the court prevent the defendant's insurance carrier from examining and resolving any apparent conflict of interest created by its insistence that its retained counsel be trial counsel at the same time it was

disclaiming coverage. If the defendant suffered as a result of his insurance carrier's decision, then his relief lies in the declaratory judgment proceeding and should be received from his insurance carrier, not from this Court.

II.

The civil defendant was not denied any right to counsel under the Fifth Amendment or Pennsylvania law.

Petitioner raised three questions for review, only one of which was raised post-trial in the district court or in the court of appeals. He contends: (1) He has a constitutional right to representation by counsel of his choice under the Fifth Amendment which was violated by the trial court's exclusion of Mr. Dunn; (2) He has a constitutional right to representation by counsel of his choice under the Fifth Amendment which was violated by the court's selection of Mr. Joseph; and (3) He has a right to separate and individual representation under Pennsylvania law which was violated by the trial court's exclusion of Mr. Dunn.

That the trial court did *not* exclude Mr. Dunn or choose Mr. Joseph has been treated in the foregoing discussion.

Petitioner's constitutional arguments are made for the first time in this Court. The only section of petitioner's brief in the court of appeals dealing with counsel issues is reproduced in full in the Appendix (3a). It is fundamental that this Court will not review a question not raised in the court of appeals in the absence of exceptional circumstances. *Lawn v. United States*, 355 U.S. 339, 362 n. 16 (1958); *California v. Taylor*, 353 U.S. 553, 556 n. 2. (1957). No such circumstances exist here.

Nevertheless, the petitioner extrapolates a federal right to dual representation by Mr. Joseph and Mr. Dunn from criminal cases such as *United States v. Burton*, 584 F.2d 485 (D.C. Cir.

1978), affording a criminal defendant only the opportunity to secure counsel of his own choosing (an opportunity the insurer afforded the civil defendant here), state court cases such as *Esmond v. Liscio*, 209 Pa. Super. 200, 224 A.2d 793 (1966), defining only the nature of punitive damages, and *DePrampiero v. Fidelity and Casualty Co. of N.Y.*, 286 F.2d 367 (3d Cir. 1961), allowing the insurer to prove lack of coverage in post-trial proceedings. Search as he has, petitioner has not found a single case holding that he has a right to have been represented at trial by both Mr. Joseph and Mr. Dunn.

The cases cited by petitioner to support his state law claim are equally inapposite. The issue, for example, in *Seifert v. Dumatic Industries, Inc.*, 413 Pa. 395, 197 A.2d 454 (1964), was who should represent the party, not whether two attorneys should be permitted dual representation. Involved was a petition for removal of counsel prior to trial. Cases such as *Bernat v. Socke*, 180 Pa. Super. 512, 118 A.2d 253 (1955), denying excess liability because the insured retained private counsel, pertain to the declaratory judgment action pending in the lower court, not this case. Similarly, respondent cannot quarrel with cases holding that the insurer should notify the insured of any possible conflict of interest and of his right to have private counsel represent him instead of the insurer's counsel. *E.g., Nichols v. American Casualty Co.*, 423 Pa. 480, 225 A.2d 80 (1966); *Perkoski v. Wilson*, 371 Pa. 553, 92 A.2d 189 (1952).

Once again, petitioner has cited no cases upholding the right he now claims to possess.

No right of the defendant was violated in this case.

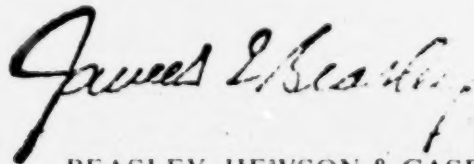
A trial court has great discretion in determining the procedures to be used at trial, and no abuse of that discretion has been alleged. The Local Rules of Civil Procedure for the United States District Court for the Eastern District of Pennsylvania address that discretion in regard to the number of

attorneys conducting questioning and addressing the jury. Local Rule 32(b) provides: "On the trial of an issue of fact, only one attorney on either side shall examine or cross-examine any witness, unless otherwise permitted by the Court." Likewise, Local Rule 33(a) reads: "Unless the trial judge shall otherwise grant leave, only one attorney may sum up for any party." Had Chief Judge Lord exercised his discretion and allowed two attorneys for Dr. McCabe to pose questions, objections, legal argument and jury argument, an unmanageable trial would have resulted. The jury would have become confused, the examination of witnesses lacking in cohesiveness, the trial unduly prolonged and the court's and jury's attention distracted from the legal and factual issues in the case before them.

CONCLUSION

As there is no factual basis upon which to address the right which petitioner supposes, no raising and preservation of that "right" and no legal support for the position petitioner has taken to invoke this Court's discretion, respondent respectfully prays that this Honorable Court deny the petition for certiorari.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "James E. Beasley".

BEASLEY, HEWSON & CASEY
Attorneys for Respondent

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APPENDIX

ENTRY OF APPEARANCE

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

GALE GREENBERG

vs.

DONALD LEE McCABE, D.O.

CIVIL ACTION

NO. 76-342

TO THE CLERK:

Kindly enter my appearance as co-counsel on behalf of the
defendant, Donald Lee McCabe, D.O., in connection with the
above-entitled matter.

s/ Jonathan D. Dunn
JONATHAN D. DUNN,
ESQUIRE
Co-counsel for Defendant

JONATHAN D. DUNN
Attorney At Law
Box 65
East Greenville, Pa.
679-2968

EXCERPTS OF NOTES OF TESTIMONY

(NTI-24, 1-25)

THE COURT: I only tell you that to illustrate that all of this and the fact that this is in my judgment the finest Courthouse in the United States — and I have seen a lot of them — we still have breakdowns like this where we can't even work.

I am not going to keep you here with a temperature of 87 degree in the courtroom. Some of you might be like me, you might be starting to get sick, because I am from this heat. I don't want that to happen to you.

Secondly, there is no conceivable way that you could pay any intelligent attention to the evidence, if it were to start this afternoon, or the proceedings.

Gentlemen, do you want to finish your voir dire or do you just want to start tomorrow? I don't care.

MR. BEASLEY: I am willing to start tomorrow.

MR. JOSEPH: So am I, sir. I think in fairness to the jury and everyone, it has become distinctly uncomfortable.

THE COURT: I do too. I think it is awful.

* * *

THE DEPUTY CLERK (Mr. Benedetto): All rise. Court is adjourned until tomorrow morning at 10 o'clock.

(Court is adjourned for the day at 2:25 p.m. until Wednesday, September 7, 1977, at 10 o'clock a.m.)

EXCERPT OF PETITIONER'S BRIEF IN THE COURT OF APPEALS

THE TRIAL COURT ERRED IN EXCLUDING DEFENDANT'S PRIVATE COUNSEL FROM PARTICIPATING ACTIVELY AT THE TRIAL

Public policy as defined by Pennsylvania law does not permit a defendant who is found guilty of outrageous conduct to shift the burden of punitive damages to his insurer. *Esmond v. Liscio, supra*, 209 Pa. Super. at 212.

While Mr. Joseph, counsel designated by the carrier was defending the matter fully, nevertheless its direct exposure cannot exceed applicable coverage which does not include punitive damages. A possible conflict could arise thereby allowing defendant to retain an attorney of his choice. *Seifert v. Dumatic Industries, Inc.*, 413 Pa. 395, 398, 197 A.2d 454 (1964). The defendant retained his own private counsel, Mr. Dunn, to represent his interests on the punitive damages issue. Since Mr. Dunn was not permitted to participate actively at trial, the defendant's right to a full defense on the punitive damages issue may have been compromised, therefore, necessitating the reversal of the punitive damages award and granting of a new trial on that issue. Timely objections were made by Mr. Dunn to the trial Court's refusal to allow him to examine the witness and argue to the jury and court (20a-21a).